APR 23 1991

No. 90-1230

FILED
APR 23 1991
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

MARY McDERMOTT AND ALPHONSE IANNACONE,

*Petitioners,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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April 19, 1991

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Petitioners, Mary McDermott and Alphonse Iannacone, respectfully submit this reply brief in support of their petition for a writ of certiorari.

### ARGUMENT

There is little in the government's brief in opposition which was not covered in the petition. Only a few points in reply are necessary.

**1. Section 241 of Title 18 is not Applicable**

As to the applicability of the felony provision of Section 241 of Title 18: The government's brief (p. 5) misstates the basic position of petitioners. They do not assert that police officers are immune as sueh from the provisions of Section 241. As stated in the petition at page 8:

> Petitioners do not assert, and never have, that a governmental official may not be a member of such a mob operating out of the context of official procedures or that in fact police officers might not possibly constitute such a mob and therefore be subject to Section 241. But that so obviously is not the situation at hand.

The government brief very notably ignores the first question posed in this petition. Sections 241 and 242 of Title 18 were enacted as complementary legislation some 120 years ago. They were amended in respects not affecting the issues before the Court as recently as three years ago manifesting a continuing legislative intent respecting the stated differentiation in federal criminal sanctions reflected in these two Sections. If Section 241 covers an enforcement team of two police officers acting exclusively within their official authority and subject to routine procedures in merely making arrests for specific misdemeanors with no purpose other than the making of the arrests, then what could *possibly* be the purpose of Section 242?

The authorities under Section 241 in the government's brief which are not dealt with in the petition are *United States v. Ellis*, 595 F.2d 154 (3rd Cir.), *cert. denied*, 444 U.S. 838 (1979); *United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976); and *United States v. McClean*, 528 F.2d 1250 (2d Cir. 1976). As in the instances of *United States v. Price*, 383 U.S. 787 (1966); *United States v. Garza*, 754 F.2d 1202 (5th Cir. 1985); and *McClean* (govt. brief pp. 4-5), these decisions are not remotely applicable. Neither involved an arrest as such. *Ellis* involved the use of "systematic" beatings and other "barbaric" methods to obtain a palpably false confession. *Barker* involved a *burglary*

for apparently political purposes completely unrelated to any enforcement activity under any criminal law by "unofficial" investigators – compare them with the petitioners before the Court who had 18 years and 8 years of exemplary performance as regular, full-time, professional police officers enforcing commonplace misdemeanor laws. And as noted, *Garza* did not, as the government asserts, involve "police officers;" it involved one part-time deputy sheriff and another who had no official capacity who simply seized people, held them for extended periods in a local jail without any charge and beat them, and then released them without any formal procedures at all, and not apparently connected in any way with any official responsibility. And again in *McClean*, the violation was not an arrest without probable cause for arrest – indeed there was certainly ample probable cause – but the use of a threat of arrest to extort money. So the Constitutional wrongs in all of these cases involved murder, beatings and extortion – not arrests as such.

**2. Section 242 of Title 18 is not Applicable**

As to the applicability of the misdemeanor provisions of Section 242: The government's citations which are not dealt with in the petition are likewise not applicable at all to the simple, unadorned arrest in Count Four of the indictment. In *United States v. McQueeney*, 674 F.2d 109 (1st Cir. 1982), the arrest was a cover for a brawl between plainclothesmen, who did not identify themselves, and the persons arrested, in which there was an assault by the officer with a bottle and the use of excessive force (kicking the victim and hitting him on the head with a pistol). *Brown v. United States*, 204 F.2d 247 (6th Cir. 1953), involved a conspiracy between a deputy sheriff and another to cause an arrest for the purpose of extortion. *Culp v. United States*, 131 F.2d 93 (8th Cir. 1942), again was based on incarcerations for long periods and beatings for the purpose of extortion.

The only possible non-official purpose of the arrests in this case was the baseless charge of ethnic motivation – but this of course was withdrawn.

It is noteworthy that all of the aggravated situations cited by the government were prosecuted under the misdemeanor provisions of Section 242 rather than the felony provisions of Section 241, which are the basis of the two-year sentences imposed on petitioners in this case.

After 120 years of enforcement of Sections 241 and 242, these precedents are all that the government can present. Of course there are no decisions "at odds" with them (footnote 6, govt. brief p. 6) because no one has ever been prosecuted under either Section for an arrest as such. Petitioners repeat their original assertion respecting the interpretation of these Sections which is that this is a case of first impression after 120 years and untold millions of arrests by police officers, many of course without probable cause.

### 3. The Criteria of Section 1983 of Title 42 should not be Applied

Under the circumstances the government in its brief resorts to instances of civil sanctions imposed under Section 1983 of Title 42. (*See* cases cited in footnote 5, govt. brief pp. 4-5.) Indeed, in the case at hand the persons arrested who testified in the trial below that they were falsely arrested are themselves claimants in substantial civil cases for money damages, but that certainly does not and should not mean that the same substantive criteria should impose criminal liability. Otherwise, why haven't the various civil defendants in the cases cited by the government been criminally charged? As stated in the petition, it is very important that this Court deal with the matter of whether or not the flexible remedial concepts adaptable to damaging situations which have evolved under Section 1983 will in the future impose a duty of criminal prosecution under Sections 241 and 242 as clearly inferred from the decision below and virtually asserted in the government brief.

In all of this the Court should be guided by the words of Justice O'Connor in *United States v. Kozminski*, 487 U.S. 931 (1988) at 952:

> * * * we adhere to the time-honored interpretive guideline that uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity.

What then should be the proper criteria? Petitioners submit, as clearly indicated by the statutory language, that when government officials are performing acts fully within the procedural formalities and within the scope of their responsibilities, then clearly the legislative mandate expressed in the distinctions between Section 242 and Section 241 must be respected, and moreover, when such activity is without ulterior motive, or non-official purpose or is not accompanied by excessive measures, it does not even constitute a violation under Section 242.

4. Denial of Due Process

The government brief (p. 2) asserts that "all charges were dropped without disposition prior to trial." This certainly should not create the indicated impression that there was lack of support for the arrests, which were reviewed and confirmed at the time by the New York County District Attorney's office. It was and is routine policy in New York City for all such misdemeanor arrests to be handled in this way. It can be safely said that every day in New York there are innumerable misdemeanor arrests disposed of on exactly the same basis as were the eight arrests cited in the indictment.

As to the racial charges in the original indictment, the government brief (p. 2, 6-7) dismisses them as mere surplusage. On the face of it, these utterly unfounded charges were deliberately inserted as the only purpose of the so-called conspiracy, the very non-official element that might bring it under Section 241 or 242. And any reading of the indictment with and without the charges makes that clear.

The government brief (p. 6) goes on to assert that petitioners "fail to demonstrate how the grand jury was biased against them * * *" as a result of these charges. When such charges, now claimed to be mere surplusage, are inserted without any basis

at all by the prosecution, it is submitted that creating a bias was a manifest purpose, and therefore, it is proper to infer that in fact that purpose was achieved. We are not speaking of grand jury bias which might possibly exist without any instigation by the prosecution but rather as a result of purely external circumstances. But when the prosecution deliberately plays upon such external circumstances by the use of false allegations, then such instigated bias should be presumed.

The government brief (p. 7) respecting the prosecutor's highly emotional summation seems to have missed the point. In evidence were the petitioners' contemporary notebooks and official reports describing the circumstances of the arrests. As can be imagined the behavior of a subject in the eyes of experienced police officers leading up to an attempt at picking a pocket or a sexual rubbing is set forth. These are the documents that were denounced over and over again by the prosecutor as "lies." As it happened, petitioners chose to rest their case on these contemporaneous notes and reports reflecting arrests that had taken place five years before the trial and were among innumerable similar arrests by their team. They had a Constitutional right to do so. Perhaps in retrospect this was a tactical error, but certainly the prosecutor had no right to blurt out: "Did they offer any explanation for these lies? No!" (Govt. brief p. 7.) The only possible explanation could have been the testimony of petitioners themselves. The prosecutor knew this, the trial court knew it, the jurors knew it; but apparently the government attorneys in their brief in opposition did not understand it as such.

## CONCLUSION

Again, this case presents a crucial expansion of criminal law respecting police officers as well as important due process questions. The Court should grant the petition and hear it.

Respectfully submitted,

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Dated: New York, New York
April 19, 1991